Petition

81-1933

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

WILLIAM R. LEWIS,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the double jeopardy clause, as applied to the states through the fourteenth amendment, bar the retrial of a defendant who is acquitted by the trial court judge after a determination, later reversed on appeal, that the state's evidence is insufficient?

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OPINION BELOW

The opinion of the Supreme Court of Indiana, dated December 31, 1981, is reported at 429 N.E.2d 1110 (Ind. 1981), and is set out in full in the Appendix. That court denied a motion for rehearing without opinion on February 24, 1982. The opinion of the trial judge for the Lake Superior (Indiana) Court was rendered on April 11, 1980, and is set out in full in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on December 31, 1981. A timely petition for rehearing was denied on February 24, 1982, and this petition for a writ of certiorari was filed within sixty (60) days of that date. This

Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The double jeopardy clause of the fifth amendment to the United States Constitution, which provides "nor shall any person be subject for the same offence to be twice put into jeopardy of life or limb . . . ."

STATEMENT OF THE CASE

Petitioner Dr. William R. Lewis, defendant herein, was charged by indictment with the performance of an unlawful abortion. He entered a plea of not guilty, and trial by jury commenced on February 4, 1980, before the Lake Superior (Indiana) Court, Criminal Division. After the state rested, the defendant moved for judgment

on the evidence. The motion was denied, and the defendant presented his case. After the presentation of all evidence, the defendant renewed his motion for judgment on the evidence. The trial court granted the motion as to the charge of performance of an unlawful abortion, but denied the motion with regard to the included offense of attempted performance of an unlawful abortion. The charge on the included offense was submitted to the jury on February 8, 1980.

After seven hours of deliberation, the jury was hopelessly deadlocked. Upon motion by the defendant, the trial court declared a mistrial and discharged the jury. The state filed a motion asking the court to set the case for retrial. The defendant, by memorandum of law and oral argument,

raised the defense of the double jeopardy clause to any retrial on the same charge, and renewed his motion for judgment on the evidence. The motion for judgment on the evidence was granted by the trial judge on April 11, 1980, who stated that "there is insufficient credible evidence upon which reasonable minds might fairly conclude guilt beyond a reasonable doubt of the crime . . . ." (App. at A-58.) The court did not rule on the question of whether a retrial of the defendant would violate the double jeopardy clause. The state's motion to correct errors was overruled, and the state appealed to the Supreme Court of Indiana.[1]

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[1] Appeal was taken pursuant to Ind. Code Ann. § 35-1-47-2 (Burns 1979), which then provided, inter alia, that the state could appeal in a criminal case "upon a question reserved by the state." The provision now grants appeals "upon a question reserved

The Indiana Supreme Court, with two justices dissenting, ruled that while the trial court had authority to grant a judgment on the evidence for the defendant after a mistrial, it had acted improperly as a "thirteenth juror" in this case. The defendant's motion for judgment on the evidence was therefore improperly granted. The defendant briefed and argued for the court the question of whether the double jeopardy clause precluded a second trial, but the court held that the state would not be barred

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[1] (continued) by the state, if the defendant is acquitted." I.C.A. § 35-1-47-2(4) (Supp. 1981). Neither version states when the defendant may be retried. Section 35-1-47-4 (1979) would apparently allow the retrial of an appellee-defendant only where the state appealed an order whereby the defendant was discharged prior to trial. [See Prentice, J. (dissenting), App. at A-48.] This statute was not cited in the majority opinion.

from retrying the defendant on the same charge. Since the motion for judgment on the evidence should have been denied, reasoned the court, the defendant was left in the same position as if the entire case had terminated with a hung jury.

The defendant filed a motion for rehearing and supporting brief, again asserting the protection of the double jeopardy clause. The court denied the motion without written opinion on February 24, 1982. (App. at A-60.) The state has now filed a motion for retrial of the defendant. (App. at A-61.)

REASONS FOR GRANTING THE WRIT

THE INDIANA SUPREME COURT'S DECISION TO ALLOW THE REPROSECUTION OF AN ACQUITTED CRIMINAL DEFENDANT IS IN DIRECT CONFLICT WITH ESTABLISHED CASE PRECEDENT OF THIS COURT.

Recently this Court had occasion to point out that:

> Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that "[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." United States v. Ball, 163 U.S. 662, 671 (1896).

United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). The rule that the constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal on the merits has been

consistently recognized in the decisions of this Court. See Bullington v. Missouri, ___ U.S. ___, 101 S. Ct. 1852, 1861 (1981); United States v. DiFrancesco, 449 U.S. 117, 129 (1981); Burks v. United States, 437 U.S. 1, 16 (1978); Sanabria v. United States, 437 U.S. 54, 64 (1978); United States v. Scott, 437 U.S. 82, 91 (1978); Green v. United States, 355 U.S. 184, 188 (1957). "If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." Arizona v. Washington, 434 U.S. 497, 503 (1978).

The defendant was acquitted by the trial court of the only charge pending against him. After a mistrial was declared and the jury discharged, the trial court granted the defendant's

motion for judgment on the evidence, stating:

> The Court finds that there is insufficient credible evidence upon which reasonable minds might fairly conclude guilt beyond a reasonable doubt of the crime of attempt to perform an illegal abortion, and that judgment on the evidence should be rendered for the defendant.

(App. at A-58.) The dispositive test for determining what constitutes an "acquittal" for double jeopardy purposes is "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." United States v. Martin Linen Supply Co., supra, 430 U.S. at 571. Although the judgment on the evidence was clearly an acquittal, the Supreme

Court of Indiana ruled that the defendant may be retried, thereby transgressing a well-settled constitutional rule established by this Court.

The Indiana Supreme Court also held that, as a matter of state law, the trial court had authority to grant a motion for judgment on the evidence after a mistrial is declared due to a hung jury in a criminal prosecution. (App. at A-18.) The judgment on the evidence was improper, ruled the court, only because the trial judge erroneously utilized a "thirteenth juror" standard in granting the motion. Since the motion should have been denied, "the defendant is left in the same position as though the motion had not been made and the trial is ended with a hung jury." (App. at A-35.) The Indiana Supreme

Court's failure to attach any significance to the acquittal because it was erroneous is in total disregard of this Court's mandate that all acquittals for insufficient evidence preclude subsequent prosecutions. For purposes of double jeopardy analysis, it is of no consequence that the judgment of acquittal may be subsequently declared erroneous by a reviewing court. In Fong Foo v. United States, 369 U.S. 141, 143 (1962), the Court held that a judgment of acquittal was final and could not be reviewed without putting the defendant twice in jeopardy, even though the acquittal may have been based "upon an egregiously erroneous foundation."

Although addressing the propriety of a federal government appeal, the Court's decision in United States

v. Martin Linen Supply Co., supra, squarely controls the question presented by this petition. In Martin Linen the Court concluded that a judgment of acquittal, entered by the trial judge following the discharge of a hung jury, barred an appeal by the government, since a reversal of the acquittal would allow a second prosecution of the defendant. As in the present case, the trial court in Martin Linen had examined the government's evidence and determined that it was insufficient to sustain a conviction. Whether correct or not, that determination triggered the protection of the double jeopardy clause against a second trial. The same protection must be given the defendant here, as the constitutional guarantee of the double jeopardy clause of the fifth amendment

is applicable to the states through the due process clause of the fourteenth amendment. Illinois v. Vitale, 447 U.S. 410, 415 (1980); Benton v. Maryland, 395 U.S. 784, 795 (1969).

The Indiana Supreme Court's decision to allow a retrial of the defendant directly contradicts this Court's holding in United States v. Martin Linen, supra, and cannot be reconciled with the settled interpretation of the double jeopardy clause. Review of the decision now is proper, as the highest state court has rejected the defendant's double jeopardy claim. Bullington v. Missouri, supra, 101 S. Ct. at 1857 n. 8; Harris v. Washington, 404 U.S. 55, 56 (1971). As the double jeopardy clause guarantees against being twice put to trial for the same offense, Abney v. United

States, 431 U.S. 651, 661 (1977), and as the state has moved for retrial (App. at A-61), the defendant is in imminent danger of being deprived of a basic constitutional freedom. Additional significance attaches to the decision below, as any defendant now acquitted in Indiana must ponder the potential of the state to retry him for the same offense. The substantial federal constitutional question raised herein should be reviewed now by this Court.

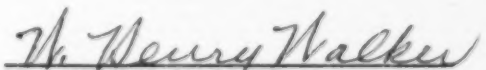
CONCLUSION

The opinion of the Supreme Court of Indiana fails to recognize the special weight accorded an acquittal on the merits by the trial court. The decision regarding double jeopardy is in direct conflict with established

case precedent from this Court, and the petitioner is now threatened with the violation of his constitutional right not to be tried twice for the same offense.

For the aforementioned reasons, the petitioner prays that a writ of certiorari to the Supreme Court of Indiana be granted.

Respectfully submitted,



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I hereby certify that I have on this 15th day of April 1982 mailed three copies of this petition, first class, postage prepaid, to:

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Appendix

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SUPREME COURT OF INDIANA

STATE OF INDIANA,

Appellant,

v.

WILLIAM R. LEWIS, M.D.,

Appellee.

No. 381S84
December 31, 1981

PIVARNIK, Justice.

On March 21, 1979, the Lake County Grand Jury returned an indictment against the Appellee-Defendant, Dr. William R. Lewis, charging him with the Performance of an Unlawful Abortion. He entered a plea of not guilty to this charge. Trial commenced on February 4, 1980. After the State rested, the defendant moved for judgment on the evidence, which motion was denied. The defendant rested and the State offered rebuttal evidence. After the State rested,

the defendant again moved for judgment on the evidence. The court granted the motion as to the charge of Performance of an Unlawful Abortion, apparently due to the fact that the trial court determined that Mrs. Carr did not "abort." However, the court denied the motion with regard to the included offense of Attempted Performance of an Unlawful Abortion.

The case was submitted to the jury on February 8, 1980, on the charge of Attempted Performance of an Unlawful Abortion. After seven hours of deliberation, the jury was deadlocked. The Court declared a mistrial and discharged the jury on February 9, 1980.

On February 13, 1980, the State filed a motion asking the court to set the case for retrial. On February 20, 1980, defendant Lewis repeated his motion

for judgment on the evidence pursuant to Trial Rule 50. On April 11, 1980, the trial court granted defendant's motion for judgment on the evidence. The State filed a motion to correct errors on June 6, 1980. Hearing was had on that motion on June 27, and on June 30, the court overruled the State's motion to correct errors. It is from this judgment that the State appeals. The State petitioned to transfer this case from the Court of Appeals to the Supreme Court pursuant to Appellate Rule 4(A)(10). This petition was granted and transfer was so ordered on March 26, 1981.

The State claims that the trial court erred in granting defendant's Motion for Judgment on the Evidence after a hung jury and after a mistrial had been declared, and by incorrectly

applying the "thirteenth juror" standard to the defendant's post-trial Motion for Judgment on the Evidence pursuant to Trial Rule 50.

In September of 1978, Lynda Carr, a thirty-one year old mother of four, was told by her family doctor that she was pregnant. Mrs. Carr wished to terminate the pregnancy.

On September 30, 1978, Mrs. Carr and a friend, Debbie Dotson, went to Concord Medical Center in Chicago, Illinois, to arrange for an abortion. She was examined by Dr. Mandan Farahati, who diagnosed that she was fifteen weeks advanced in her pregnancy. Since the clinic performed only first trimester abortions, Mrs. Carr was refused an abortion and referred to a hospital in Wisconsin where the cost for a second trimester procedure would be six hundred

dollars. Being unable to raise that amount of money, Mrs. Carr took no further action to obtain an abortion until two months later.

On a suggestion from Miss Dotson, Mrs. Carr went to the Gary Northwest Indiana Womens Services, Inc., Clinic on November 28, 1978. Mrs. Carr was told initially that the cost for an abortion at the Gary Northwest Clinic would be two hundred dollars. She filled out a form consenting to an abortion. Mrs. Carr was then examined by the appellee-defendant, Dr. William R. Lewis. Both an internal and an external examination were performed. After the examinations, Lewis told Mrs. Carr that he could not perform a "suction curretage" [sic] method of abortion on her and that "something else would have to be done."

Mrs. Carr was then instructed by

a nurse at the clinic to return the following Monday. She was told that at that time the doctor would put her to sleep, "'inject small, little match-like things' into her and then something would be inserted into her stomach; that she would [']go home and . . . abort the baby.[']"

On Monday, December 4, 1980, Mrs. Carr returned to the Clinic, paid five hundred and ninety ($590) dollars in cash and received a receipt for that amount of money. She was instructed that she would be last patient of the day because the procedure being used for her would take a little longer than the others. She was given a prescription for a drug called "TACE" and was told the drug would dry up her milk after she aborted the baby. Since she had to wait she went to the drugstore and had the prescription filled and took some immediately.

She was also given antibiotics so she would not get an infection, and other pills which she was to take the next day, if she had not gone into labor, to contract her uterus. She was instructed to go home to abort the baby and told that when labor pains started she was to go to the bathroom, put a plastic garbage bag in the toilet and "let it happen." She was to return the bag and its contents to Dr. Lewis for disposal.

After all of the other patients had left, Mrs. Carr had her stomach cleaned and Dr. Lewis inserted the "little match sticks" or dilators, into her cervix. Dr. Lewis inserted needles into her stomach and made four or five injections. Mrs. Carr became ill and vomited while in the doctor's office. She then went home and went to sleep. She vomited during the night.

Her mother called an ambulance, but Mrs. Carr refused to go to the hospital. The ambulance was called again and police were also called. The police strapped Mrs. Carr down and took her to St. Mary's Medical Center. Dr. Phillip Kellar examined and diagnosed Mrs. Carr to be clearly in the late second trimester of her pregnancy. When she was admitted it was noted that an abortion had been attempted. Dr. Kellar kept Mrs. Carr under observation throughout the day. Her condition continued to deteriorate. Late in the evening of December 5, Dr. Kellar called in Dr. Chester Kmak, an obstetrician. Dr. Kmak examined Mrs. Carr, diagnosed her to be five and one-half months pregnant, incoherent, acutely ill, and determined that her condition was so critical that if nothing were

done she would probably die. Assuming that the fetus was dead and that this was causing Mrs. Carr's condition, Dr. Kmak decided to perform a Caesarean section. A live baby boy was delivered. The child weighed one pound and four ounces, and measured twelve inches in length. It was determined to be five and one-half to six months maturity. The child lived for approximately two hours.

I.

The State claims that the trial court erred in granting Defendant's Motion for Judgment on the Evidence. The State argues that the law in Indiana is clear that the failure of a jury in a criminal case to agree on a verdict and the subsequent declaration of a mistrial renders the initial proceeding

a "nullity" entitling the State to a retrial. The State cites us to Hinton v. State, (1979) Ind., 397 N.E.2d 282; State v. McMillan, (1980) Ind., 409 N.E.2d 612; and Harlan v. State, (1921) 190 Ind. 322, 130 N.E. 413 for support for this claim. The State also brings to our attention that in Hendry v. Crandall, (1892) 131 Ind. 42, 30 N.E. 789, the court held that a judge was without power or authority to decide a case after the matter had been submitted to the jury and no verdict could be reached. Another case cited to us is Murray v. Hauser, (1898) 21 Mont. 120, 53 P. 99 in which the Montana Supreme Court ruled that a trial court erred in entering judgment for the defendant on a contractual claim after the jury failed to reach a verdict and had been discharged. The court there stated that the disagreement

of the jury and their discharge resulted in a mistrial and that that which would have been a trial, had the jury rendered a verdict, became a nullity and that therefore, as a result of the declaration of a mistrial, the parties were restored to the same position they occupied before the trial.

In addition, it is argued that the State has a statutory right to a retrial after the declaration of a hung jury and a mistrial, and a jury is discharged.

Ind. Code §§ 34-1-21-7 and 34-1-21-8 (Burns 1973) provide:

> Sec. 7. The jury may be discharged by the court . . . after they have been kept together until it satisfactorily appears that there is no probability of them agreeing.
> Sec. 8. In all cases where the jury are discharged during

> the trial, or after the cause is submitted to them, it may be tried again immediately or at a future time, as the court may direct.

However, this statutory provision is subject to the Rules of Trial Procedure as promulgated by the Indiana Supreme Court. State ex rel. Western Parks, Inc. v. Bartholomew County Court, (1978) Ind., 383 N.E.2d 290. Legislative rules of procedure are effective unless a court rule supercedes them or they are incompatible, in which case the court rule takes precedence. Neeley v. State, (1974) 261 Ind. 434, 305 N.E.2d 434. Rules of civil procedure, whether statutory or court-made, are applicable to criminal cases where no criminal procedural rule or statute exists. Ind. Code § 35-4.1-2-2 (Burns 1971 Repl.)

The conflict in this issue arises from the apparent grant of authority to the trial court to grant a motion for judgment on the evidence after the jury is discharged. Ind.R.Tr.P. 50(B). This section grants the trial court the power to enter judgment after the verdict. It is not specified, however, that provision is made for the granting of judgment on the evidence after a hung jury where no verdict is rendered. It is not specified that provision is made for submitting the issues to the jury and then entering judgment absent a verdict.

Ind.R.Tr.P. 50 was modeled after the corresponding federal rule. Changes were made, however, a ten-day time limitation for the making of a motion for judgment on the evidence after judgment in the federal rule was not included

in the Indiana rule. W. Harvey, 3 Indiana Practice at p. 368 (1970). The federal rule also provided for the situation where no verdict was returned as follows, ". . . or if no verdict was returned such party within ten days after the jury has been discharged may move for judgment in accordance with his motion for a directed verdict." It further provided: "If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." Fed.R.Civ.P. 50(b). Reference to the procedure for granting a Rule 50 motion where no verdict was returned was removed from the Indiana version of this rule. The State urges that this deletion was conscious and that Ind.R.Tr.P. 50 cannot logically be read to allow for a motion for judgment on the evidence after a hung jury.

Under Ind.R.Tr.P. 50(A), a party may move for judgment on the evidence during trial, after all the evidence has been presented and before judgment; or in a motion to correct errors or on appeal after a judgment. The trial court on its own motion may enter such a judgment at any time before a motion to correct error is required to be made; or if one is made, at any time before entering its order or ruling thereon.

Ind.R.Tr.P. 50(B) provides that:

> "Every case tried by a jury is made subject to the right of the court, before or after the jury is discharged, to enter final judgment on the evidence, without directing a verdict thereon."

It appears clear that our Trial Rule 50 has granted the authority to the trial court to enter final judgment on the evidence either before or after

a jury is discharged. We hold that the trial court here had the authority under Ind.R.Tr.P. 50 to grant a judgment on the evidence for the defendant where no verdict was returned and after the declaration of a mistrial and the discharge of the jury.

II.

The State next claims that the trial court erred by incorrectly applying the "thirteenth juror" standard to defendant's post-trial motion for judgment on the evidence.

The standard to be applied to granting a motion for judgment on the evidence has been set forth by our Court. In Huff v. Travelers Indemnity Co. (1977) 266 Ind. 414, 363 N.E.2d 985 this Court discussed Ind.R.Tr.P. 50(A)(4) and Ind. R.Tr.P. 59(E)(7). In Huff, supra, the

Court set out the proper standards for determining the relief to be granted when a judgment on the evidence is sought. Huff was a civil case in which a jury verdict was returned. Those standards were set out as follows:

> "When the trial court is considering a motion for judgment on the evidence subsequent to the jury's verdict, it must view only the evidence favorable to the nonmoving party and the reasonable inferences to be drawn from that evidence. The trial court may enter judgment only if there is no substantial evidence or reasonable inference to be adduced therefrom to support an essential element of the claim, i.e., the evidence must point unerringly to a conclusion not reached by the jury. McCague v. New York, Chicago & St. Louis R.R. (1946), 225 Ind. 83,

> 71 N.E.2d 569, 73 N.E.2d 48. This is the same standard which applies to a motion for judgment made at the conclusion of the evidence, i.e., there must be a complete failure of proof.
>
> 'It is only where there is a total absence of evidence or legitimate inferences in favor of plaintiff upon the issues, or where the evidence is without conflict and is susceptible of but one inference and that inference in favor of the defendant. . . .' Hendrix v. Harbelis (1967) 248 Ind. 619, 230 N.E.2d 315; accord, Vernon Fire & Cas. Ins. Co. v. Sharp (1976) Ind., 349 N.E.2d 173; Miller v. Griesel (1974) 261 Ind. 604, 308 N.E.2d 701."

Id., at 421, 363 N.E.2d at 990.

Recently the applicability of the "thirteenth juror" test to criminal cases was addressed in Moore v. State,

(1980) Ind., 403 N.E.2d 335. The court in Moore held that the "thirteenth juror" standard applied to the question of whether or not a new trial was justified under Trial Rule 59. The use of the "thirteenth juror standard" which allows judges to weigh credibility and weigh evidence, cannot be applied in granting a Rule 50 motion for judgment on the evidence. A judgment on the evidence (directed verdict) in a criminal proceeding is proper only where there is a total absence of evidence on some essential issue or where the evidence is without conflict and susceptible to only one inference and that inference is in favor of the defendant. Proctor v. State, (1979) Ind. 397 N.E.2d 980; Williams v. State, (1979) Ind., 395 N.E.2d 239; Estep v. State, (1979) Ind., 394 N.E.2d 111; Mitchell v. State, (1978)

268 Ind. 437, 376 N.E.2d 473; Carmon v. State, (1976) 265 Ind. 1, 349 N.E.2d 167; Carroll v. State, (1975) 263 Ind. 696, 698, 338 N.E.2d 264; Johnson v. State, (1980) Ind.App., 413 N.E.2d 686; Caudle v. State, (1980) Ind. App., 404 N.E.2d 57; France v. State, (1979) Ind. App., 387 N.E.2d 66; State v. Seymour, (1978) Ind.App., 379 N.E.2d 535.

In the present case, in granting the defendant's motion for judgment on the evidence the trial court stated:

> The Court finds that there is insufficient credible evidence upon which reasonable minds might fairly conclude guilt beyond a reasonable doubt of the crime of attempt to perform an illegal abortion, and that judgment on the evidence should be rendered for the Defendant."

Record at 299.

The defendant argues that the trial

court's statement reflects that the trial court used the correct standard and reached the decision that the State had produced no evidence on the issue of whether or not an abortion had been attempted. The State claims the trial court incorrectly applied the "thirteenth juror" standard, weighed the evidence and weighed the credibility of witnesses in granting the motion for judgment on the evidence.

This issue is not easily resolved by focusing on the limited number of words in this entry. The State urges that the use of the words "credible evidence" reveals the judge weighed the credibility of the evidence. The defendant alleges the entry is clearly a statement that the evidence was found to be insufficient. It is necessary to examine the record of the hearing

to determine which standard was used. The record reveals that the judge was concerned with the conflicting evidence he had heard, and with the definitions of "attempt" and "substantial step."

Ind. Code § 35-1-58.5-2 (Burns 1979 Repl.) provides:

> "Abortion shall in all instances be a criminal act except when performed under the following circumstances:
>
> * * * * * *
>
> (b) After the first trimester of pregnancy and before viability, for reasons based upon the professional, medical judgment of the pregnant woman's physician provided:
> (1) All the circumstances and provisions required for legal abortion during the first trimester are present and adhered to; and
> (2) It is performed in a hospital."

Attempt is defined by Ind. Code § 35-41-5-1

(Burns 1979 Repl.) as follows:

> A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime.

The State was required to prove three elements: (1) that the defendant Lewis "knew" that Lynda Carr was beyond her first trimester of pregnancy; (2) that defendant Lewis performed a "substantial step" in the process of performing an abortion on Lynda Carr; and (3) that the procedure was conducted in a place other than a "hospital" as defined by statute. It was stipulated that the procedure was conducted in a place other than a "hospital" as defined by statute, and there was no dispute on this issue.

The State introduced evidence on each of these essential issues, and there was conflicting evidence on these issues. The defendant claimed that he did not know that Lynda Carr was in her second trimester. However, Dr. Farahati, Dr. Kellar and Dr. Kmak all testified that Mrs. Carr was easily diagnosed as being in her second trimester. Doctors Costello and Moutvic, experts in obstetrics, testified that it would be almost impossible to accidentally or inadvertently diagnose a five and one-half to six months pregnant woman to be in her first trimester.

Defendant Lewis testified that he had not even started to perform an abortion on Mrs. Carr and that he therefore could not have accomplished any "substantial step" necessary to prove the crime of attempt. He claimed

that when he inserted needles into her abdomen he was using an experimental method of amniocentesis designed by him to determine age of the fetus. He also maintained that he had not injected an abortifacient solution through the needle and had not perforated the fetus.

The State's evidence showed that Lynda Carr had paid $590 for an abortion and had signed a consent form for an abortion. She received instructions from the Defendant's nurse, and medication to dry up her milk and induce labor if it had not begun the next day. She testified she remembered something having been injected into her abdomen. Needle marks were found near her naval and dilators were found in her cervix. She became ill and her condition then became critical. Expert witnesses

testified that several of these acts are initial steps in the performance of an instillation method of abortion.

At the hearing on defendant's motion for judgment on the evidence, the Court repeatedly made references to conflicts in the testimony. It is obvious he was unconvinced of defendant's guilt. However, applying the proper standard to this Ind.Tr.R.Pr. 50 motion, it is clear that the trial court must view only the evidence favorable to the non-moving party and the reasonable inferences to be drawn from that evidence. Judgment may be entered only if there is no substantial evidence or reasonable inference to be adduced therefrom to support an essential element of the claim. There must be a complete failure of proof. Huff v. Travelers Indemnity Co., (1977) 266 Ind. 414, 421, 363 N.E.2d 985, 990. The State had met

its burden of producing some probative evidence on each essential element of the charge, the evidence was conflicting, and the granting of the motion for judgment on the evidence was error.

III.

The State also claims that the trial court erred in granting the defendant's motion for judgment on the evidence by misinterpreting the law of attempt and the definition of "substantial step." At the time of this trial our general attempt statute was new and there were few cases under it to guide the court.

In Zickefoose v. State, (1979) Ind., 388 N.E.2d 507 this Court set forth the two elements necessary for an attempt to commit a crime, (1) the defendant must act with the culpability

or intent to commit the crime; and (2) the defendant must engage in a "substantial step" toward commission of the crime. The Court further stated:

> "The liability of the defendant turns on his purpose as manifested through his conduct. If the defendant's conduct, in light of all the relevant facts involved, constitutes a substantial step toward the commission of the crime and is done with the necessary specific intent, then the defendant has committed an attempt."

Id., 388 N.E.2d at 510.

Whether a substantial step has occurred is a question of fact, to be decided by the jury, based on the particular circumstances of each case. Cowans v. State, (1980) Ind., 412 N.E.2d 54, 55; Himes v. State, (1980) Ind., 403 N.E.2d 1377; Cole v. State, (1980)

Ind., 403 N.E.2d 337.

As discussed in Issue II, supra, the only remaining issues were whether Lewis knew Lynda Carr was in her second trimester and whether Lewis did a substantial step to accomplish the abortion. In regard to the culpability of the defendant the evidence as set out before showed that three physicians who examined Mrs. Carr testified that she was between five and one-half and six months pregnant. They testified that this condition was easily determined, and that any doctor would have had to know that she was at that stage of pregnancy had he examined her. Dr. Lewis charged Mrs. Carr $590 for an abortion when the usual fee was $200 for a first trimester abortion. Dr. Lewis stated that he believed Mrs. Carr to be in her first trimester.

The defendant's conduct, as revealed by the evidence presented and set out previously, showed that Dr. Lewis accepted the fee to perform an abortion. He had Mrs. Carr agree to the abortion. She was instructed by Dr. Lewis' nurse and received medication from her. Dr. Lewis inserted dilators and performed amniocentesis. Evidence was heard that the saline abortion method is a two-step procedure. The first step is the withdrawal of fluid through amniocentesis; the second step is the infusion of a saline solution.

The defendant emphasized that there was a lack of proof that "saline" was the substance injected to produce the abortion. He claims that because there were still things to be done to Mrs. Carr after she left his office, no offense was committed. However,

the law of attempt clearly provides that the emphasis should be on "what the defendant has already done toward committing the crime and not on what remains to be done." Zickefoose, supra, Ind., 388 N.E.2d 507, 510. Ample evidence was presented of the defendant's culpability and the commission of a substantial step toward performing the abortion. The defendant's motion for judgment on the evidence should have been denied and the granting of it was error.

IV.

Defendant's final argument, that he cannot be retried, is based on the United States Supreme Court's recent decision in Hudson v. Louisiana, (1981) 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30. Tracey Lee Hudson was tried in Louisiana state court for first-degree

murder, and the jury found him guilty. Under Louisiana law, the only method of appealing was by motion for a new trial. The judge in that case found that there was no evidence to sustain the verdict of homicide and granted the motion. The petitioner was tried a second time and was again found guilty, which guilty verdict and judgment were affirmed by the Louisiana Supreme Court, State v. Hudson, (1978) 361 So.2d 858. Petitioner sought a writ of habeas corpus in the state Supreme Court contending that the Double Jeopardy Clause barred the state from trying him a second time, relying on Burks v. United States, (1978), 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1. The trial court denied the writ, which was affirmed by the Supreme Court of Louisiana. The United States Supreme Court granted

certiorari and held that a reversal due to a failure of proof at trial, where the state received a fair opportunity to offer whatever proof it could assemble, bars retrial on the same charge.

The decision in Hudson, supra, is not applicable to this case. Since the motion for judgment on the evidence should have been denied, the defendant is left in the same position as though the motion had not been made and the trial is ended with a hung jury. The state is not barred from retrying a criminal defendant after a hung jury has been declared.

In summary, the trial court can grant a motion for judgment on the evidence only when there is no evidence or reasonable inference to be adduced therefrom to support an essential element of the charge. Here there was evidence

presented by the state on each element of the crime of attempted performance of an unlawful abortion.

The judgment of the trial court is reversed.

GIVAN, C.J., and HUNTER, J., concur.

DeBRULER and PRENTICE, J.J., dissent with separate opinions.

DeBRULER, Justice, dissenting.

The trial judge granted the defendant's motion for judgment on the evidence in the following manner:

> "The Court finds that there is insufficient credible evidence upon which reasonable minds might fairly conclude guilt beyond a reasonable doubt of the crime of attempt to perform an illegal abortion, and that judgment on the

> evidence should be rendered for the defendant."

In arguing that that trial court did not use the Trial Rule 50 standard, but rather the "thirteenth Juror" standard, the State relies upon the formulation of the latter rule in Huff v. Travelers Indemnity Co., (1977) 266 Ind. 414, 363 N.E.2d 985, which is:

> "The trial judge in determining whether to grant a new trial sits as a 'thirteenth juror'. He should grant a new trial when, after sifting and weighing the conflicting evidence and the credibility of the witnesses, he believes that a contrary result should have been reached in the minds of reasonable men." 266 Ind. at 428, 363 N.E.2d 985 (Emphasis added by the State in its brief.)

The trial judge below does not state and I do not take his finding as indicating

that the judge weighed conflicting evidence or judged the credibility of the witnesses. He states that "there is insufficient credible evidence". In so doing, I regard his finding as the equivalent of a finding that there was insufficient "substantial" evidence. Such a statement does not indicate that the judge weighed conflicting evidence or judged the credibility of witnesses. We have said many times at the appellate level in reviewing a sufficiency of evidence claim that the conviction will be affirmed if there is substantial evidence of probative value to sustain each material element of the crime charged. Brown v. State, (1969) 252 Ind. 161, 247 N.E.2d 76. This is the same standard to be applied in ruling upon a motion for judgment on the evidence.

The majority opinion makes much of what went on during the hearing upon the motion, but I see those events as consistent with the application by the judge of the proper legal standard. On appeal we have briefs which recite the evidence most favorable to the verdict. Even then, resort to the record of proceedings and the testimony is common. The trial judge does not have the benefit of such briefs. A trial judge in considering a motion for judgment on the evidence must conduct an initial investigation into the entire body of the evidence to identify and sort out that which supports the party having the burden of proof and that which does not. He will normally give vocal consideration to the meaning of words, phrases and entire testimonies, point out conflicts, and, yes, even

give voice to a belief that the defendant should be found not guilty. How many times have appellate judges been heard to say: If I had been on that jury I would probably have voted to acquit, but since I sit on a court of appeals I am duty bound to affirm the conviction?

I am satisfied that the judge had the authority to grant the motion following a mistrial on the basis of a deadlocked jury, and used the proper standard. The defendant stands acquitted according to law. I therefore dissent.

PRENTICE, Justice, dissenting.

I dissent for two reasons:

(1) The trial court committed no error.

(2) If the trial court did err, as determined by the majority, the

matter is reviewable, if at all, only as a reserved question. Such an appeal does not anticipate a remand for retrial; and in this case conditional [sic] provisions against double jeopardy proscribe it.

I

Under Issue I, the majority has held that the trial court "had the authority under Ind.R.Tr.P. 50 to grant a judgment on the evidence for the defendant. With this, I am in complete accord. It proceeds, however, to hold that under Moore v. State, (1980) Ind., 403 N.E.2d 335 and Ind.R.Tr.P. 50(C), it is limited to granting a new trial if there be any conflicting evidence. I also agree that under Ind.R.Tr.P. 59(J)(7) the trial court is so limited in civil cases, but it must be remembered that C.R. 16 makes our rules of civil

procedure applicable in criminal cases only "insofar as applicable and when not in conflict with any specific rule adopted by this Court for the conduct of criminal procedure." (Emphasis added)

The provision of Tr.R.P. 59(J)(7) which limits the court to granting a new trial cannot be applied to criminal cases consistent with the double jeopardy proscription of our state and federal constitutions or with the very limited appellate rights of the State under Ind.Code § 35-1-47-2, (Burns 1979). Neither does Tr.R. 50(C) impose limitations upon the trial court's prerogatives under Tr.R. 50(A) or (B). Rather, it simply authorizes the exercise of those prerogatives, in a proper case, to fewer than all of the issues or parties.

The holding of Moore v. State,

supra, is "that a trial judge, in ruling upon a motion to correct errors, has the duty to examine the evidence to ascertain whether or not there is evidence beyond a reasonable doubt to support the verdict." It does not hold that the court is limited to granting a new trial, in a criminal case, as it would be in a civil case. I acknowledge that such would be a reasonable inference to draw from the opinion, absent other considerations which were not before us in that case. However, the remand in Moore, supra, was simply to examine the evidence in ruling upon the motion. We did not say that the state could retry Moore, in the event that the examination revealed either no evidence or insufficient evidence.

I can be comfortable with a policy of permitting the judge to weigh the

evidence in ruling upon a motion for judgment on the evidence following the declaration of a mistrial by reason of a deadlocked jury. The State has had its opportunity to obtain a conviction and has failed. Under our practice heretofore, the decision as to whether to subject the defendant to retrial rests with the prosecutor. Unquestionably, in many cases the evidence of guilt is so strong that justice demands that the State have another chance. However, there are other instances when it should not. Who is in a better position to make that decision fairly and objectively, the judge or the prosecutor? I opt for the judge.

II

Regardless of the correctness of the grant, by the trial judge, of

a judgment on the evidence, the defendant may not be retried. There is no authorization for a reversal of the judgment following an appeal by the State upon a reserved question.

The right of the State to appeal from an adverse judgment in a criminal case is fixed by Ind.Code § 35-1-47-2 (Burns 1979), which provides:

> "35-1-47-2. [9-3204]. Appeal bystate.—Appeals to the Supreme Court may be taken by the state in the following cases:
>
> "First. From a judgment for the defendant, on quashing or setting aside an indictment or information, or sustaining a plea in abatement.
>
> "Second. From an order or judgment for the defendant, upon his motion for discharge because of delay of his trial not caused by his act, or upon his plea of former jeopardy,

presented and ruled upon prior to trial.

"Third. From a judgment of the court arresting judgment.

"Fourth. Upon a question reserved by the state."

Additionally, the right of the State is limited to those instances. State v. Sierp, (1973) 260 Ind. 57, 292 N.E.2d 245, and cases there cited.

"'Generally speaking, under the common law as understood and administered in this country, the state or United States had no right to an appeal or writ of error in criminal cases. It is apprehended that the reason for such a policy was built on the idea that, when the state in its sovereign capacity brought a citizen into its own tribunals, before its own officers, and in obedience to its own processes, and lost, its avenging hand should be stayed except in unusual

> cases where the power to appeal was expressly conferred.' 92 A.L.R. 1137." 260 Ind. at 60, 292 N.E.2d 245.

Insofar as the question of the trial court's authority to enter judgment on the evidence is concerned, this appeal is authorized by the fourth provision of the statute, "a question reserved by the state." The majority has gone much further, however, and has held that the State may retry the defendant. It is highly questionable that we should even entertain the issue of the correctness of the judgment, but it is not necessary to answer that question in order to determine the one under consideration.

I can find no case in this state where we have reversed the trial court following an appeal upon a reserved question. Rather, the decisions and

opinions in all such cases previously determined have been limited to the conclusion that the trial court did or did not err.

Granting that the State's right to appeal is limited by statute, it follows that the State's post appeal rights are also so limited. Our current statute authorizes the retrial of appellee-defendants only in those cases where the appeal taken by the State was from an order or judgment by which the defendant was discharged prior to trial. Ind.Code § 35-1-47-4 (Burns 1979 Replacement).

Under the previous statutes, authority of the State to retry an appellee-defendant was expressly withheld.

> "9-2102 [2329]. Appeal by state—Exceptions—Reserved questions—Bills of exceptions.—The prosecuting attorney may except to any decision of the court during the

prosecution of any cause, and reserve the point of law for the decision of the Supreme Court. The bill of exceptions must state clearly so much of the record and proceedings as may be necessary for a fair statement of the question reserved. In case of the acquittal of the defendant, the prosecuting attorney may take the reserved case to the Supreme Court upon an appeal at any time within one year [90 days]. The Supreme Court is not authorized to reverse the judgment upon such appeal, but only to pronounce an opinion upon the correctness of the decision of the trial court. The opinion of the Supreme Court shall be binding upon the inferior courts and shall be a uniform rule of decision therein. When the decision of the trial court is decided to be erroneous,

> the appellee must pay the costs of the appeal. [Acts 1905, ch. 169, § 286, p. 584.]" (Emphasis ours).

The 1955 amendment authorized such retrials only in those cases where the defendant had been discharged prior to trial.

The reversal and remand in this case is premised upon the evidence. For that reason alone it is questionable that the appeal should have been entertained. That question, however, need not be here determined.

In 1879 the trial judge directed a verdict for the defendant at the close of the State's evidence. The State appealed, insisting upon its right to argue both the law and the facts to the jury. The appeal was dismissed.

> "Where the court cannot render a decision upon a matter of law, reserved in a criminal case, without first passing upon the facts of the case, no appeal can be taken by the state." The State v. Overholser, (1879) 69 Ind. 144, 145.

Also in 1879 the State attempted to appeal, as a reserved question, the correctness of an instruction directing a verdict of acquittal. The appeal was dismissed.

> "We might look into the evidence, which is contained in the record, and say whether, in our opinion, there was or was not any evidence tending to establish the intent charged, and therefore whether, in our opinion, the charge was or was not correctly given, but in so doing we should be deciding a question of fact, rather than one

> of law; for the correctness of the charge depends upon the presence or absence of evidence tending to prove the intent charged in the indictment. And the question arises whether an appeal lies to this court in such case."
> The State v. Campbell, (1879) 67 Ind. 302, 303.

The point is, perhaps, explained no better than in State v. Phillips, (1900) 25 Ind.App. 579, 58 N.E. 727, wherein the State appealed from a judgment of acquittal on an agreed statement of facts. In dismissing the appeal, the court said:

> "* * * The assignment is in effect that the court erred in finding appellee not guilty as charged. The opinion which this court is authorized to pronounce on appeals by the State must

be upon matter of law and not of fact. The purpose in allowing appeals by the State where a defendant has been acquitted upon trial is not to correct only error in the particular case, but to furnish a rule for the guidance of trial courts in future cases. The State could not be granted a new trial, nor does the above statute authorize this court to review the facts and pronounce an opinion upon them. Should we in such a case look into the evidence and determine whether there was or was not evidence to sustain a conviction such determination would be binding upon no one nor would it furnish any rule for the guidance of trial courts. The error assigned presents for review only a question of fact, and not of law." 25 Ind.App. at 580, 58 N.E. 727. (Emphasis ours).

It is clear from the foregoing cases that retrials are not anticipated following successful appeals upon reserved questions.

In each of the following recent cases appeals by the State were entertained, following the grant of directed verdicts at the close of the State's case. Such appeals should have been dismissed because they were controlled by facts and the legal principle involved was settled and needed no pronouncement. However, the importance of the cases, in the context of the case before us, is that in none was the cause remanded. Rather, the holding in each was simply "Appeal sustained." State v. Kubiak, (1936) 210 Ind. 479, 4 N.E.2d 193 (appeal sustained), State v. Torphy, (1940) 217 Ind. 383, 388, 28 N.E.2d 70 (appeal sustained), State v. Schroeppel, (1959)

240 Ind. 185, 162 N.E.2d 683 (appeal sustained), State v. Patsel, (1959) 240 Ind. 240, 163 N.E.2d 602 (appeal sustained).

There is no difference between a judgment on the evidence granted before the case is given to the jury and one afterwards, provided the jury has not returned a verdict. Both are dependent upon the judge's assessment of the evidence. He may make an incorrect decision in either. If the one stands as an acquittal, why should not the other? The state, at most may be entitled to an appeal of a reserved question but not to a reversal and remand for a new trial. Having been in jeopardy and having been acquitted following an opportunity for the state to present its evidence, the double jeopardy provisions of

both our state and federal constitutions proscribe retrial of this appellee.

STATE OF INDIANA) SS: COUNTY OF LAKE)	IN THE LAKE SUPERIOR COURT - CRIMINAL DIVISION SITTING AT HAMMOND, INDIANA
STATE OF INDIANA, Plaintiff, vs. WILLIAM R. LEWIS, M.D., Defendant.	) CAUSE NO. 2CR-66-379-197) APRIL 11, 1980

ORDER

Following a trial which concluded on February 9, 1980, when the jury, being unable to reach a verdict, was discharged, the Defendant filed a written motion and supplemental motion for judgment on the evidence.

The Court had previously, at the close of all the evidence, granted defendant's motion for judgment on the evidence as to the charge stated in the indictment of performing an

illegal abortion, but had submitted the case to the jury on the question of attempt to perform an illegal abortion.

Arguments having been heard on said motions on April 10, 1980, and the Court, having considered, now finds as follows:

The Court finds that there is insufficient credible evidence upon which reasonable minds might fairly conclude guilt beyond a reasonable doubt of the crime of attempt to perform an illegal abortion, and that judgment on the evidence should be rendered for the defendant.

On the basis of the foregoing findings, the Court now grants defendant's motion for judgment on the evidence, and defendant is ordered discharged.

DATED this 11 day of April, 1980.

/s/ James J. Richards
James J. Richards,
Special Judge

SUPREME COURT OF INDIANA

STATE OF INDIANA,

Appellant,

v.

WILLIAM R. LEWIS, M.D.,

Appellee.

No. 318S84

February 24, 1982

Adjudged and Ordered that the petition for rehearing is denied.

STATE OF INDIANA	)	IN THE LAKE SUPERIOR
	SS:	COURT - CRIMINAL
COUNTY OF LAKE	)	DIVISION
	)	SITTING AT CROWN POINT,
	)	IND.

STATE OF INDIANA	)	
	)	
vs.	)	CAUSE NO. 2CR-
	)	66-379-197
WILLIAM R. LEWIS, M.D.	)	
	)	JANUARY 8, 1982

MOTION FOR RETRIAL

Comes now the State of Indiana by Jack F. Crawford, Prosecuting Attorney for the 31st Judicial Circuit, and alleges and says that:

1. On February 4, 1980, trial of the above captioned cause commenced before this Court;

2. On February 9, 1980, this Court delcared [sic] a mistrial after the jury was unable to reach a decision in this cause;

3. On February 13, 1980, the State filed a Motion for Retrial;

4. On February 20, 1980, the defendant filed a Motion for Judgment on the Evidence which motion the Court granted on April 11, 1980;

5. On December 31, 1981, the Indiana Supreme Court reversed the decision of this Court in granting defendant's Motion for Judgment on the Evidence and ruled that the State may retry the defendant on this charge.

WHEREFORE, the State of Indiana hereby renews its Motion for Retrial and asks this Court to set this cause for retrial.

/s/ Jack F. Crawford
JACK F. CRAWFORD
Prosecuting Attorney
31st Judicial Circuit

Opposition

Office - Supreme Court, U.S.
FILED
MAR 20 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM R. LEWIS,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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No. 81-1933

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM R. LEWIS,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

The respondent State of Indiana respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Supreme Court of Indiana's opinion in this case. That opinion is reported at 429 N.E. 2d 1110.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decision below does not raise the Question Presented in the Petition in that the Supreme Court of Indiana did not find that the trial court had ruled the State's evidence "legally insufficient," but rather had acted as a "thirteenth juror" in assessing the evidence.

The sole Question Presented in the Petition (p. -i-) is whether the Double Jeopardy Clause bars the retrial of a

defendant where the trial court finds the State's evidence to be insufficient as a matter of law.

After *Hudson v. Louisiana*, 450 U.S. 40 (1981), that question is no longer at issue. In *Hudson*, this Court held that a defendant may not be retried after the trial court found the State's evidence at the first trial to be "legally insufficient." A second prosecution under these circumstances would violate the Double Jeopardy Clause.

Neither the holding in *Hudson*, nor Petitioner Lewis' Question Presented, is applicable to the Supreme Court of Indiana's decision for which review is sought. As Petitioner Lewis readily admits (Pet. 5, 10), the Indiana court found that the trial judge had acted improperly as a "thirteenth juror" in granting Lewis' motion for judgment on the evidence. The Court ruled that the judge had weighed clear conflicts in the testimony in reaching its decision. (Pet. A-24, A-28).

Under Indiana law and procedure, a motion challenging the legal sufficiency of the State's evidence must be judged by a strict standard. To sustain such a motion, the evidence must be without conflict and susceptible of only one inference, which is in favor of the accused. *Carmon v. State*, 265 Ind. 1, 349 N.E. 2d 167, 168 (1976).

The Indiana Supreme Court in the instant case did *not* find that the trial judge had ruled the State's evidence to be "legally insufficient." Rather, the judge had applied the "thirteenth juror" test, whereby the court, after weighing all the evidence and assessing the credibility of the witnesses, decides that it is unconvinced of the defendant's guilt beyond a reasonable doubt. *See Moore v. State*, ___ Ind. ___, 403 N.E. 2d 335 (1980). The only remedy the court may invoke under a "thirteenth juror" examination is to order a new trial. *Id.*

This Court clearly exempted the "thirteenth juror" test from its holding in *Hudson*, 450 U.S. 40, fn. 5. Although not

specifically deciding the issue, the Court suggested that the reasoning supporting its decision in *Hudson* would not apply to a "thirteenth juror" situation. *Id.*

Hudson was premised on the decision in *Burks v. United States*, 437 U.S. 1 (1978). In *Burks*, the Court held that the Double Jeopardy Clause prohibited a second trial where a reviewing court has found the evidence "legally insufficient." 437 U.S. at 18. *Burks* clearly sets forth the strict standards applicable either in considering a motion for acquittal under federal procedure or in assessing the sufficiency of the evidence on federal appellate review. 437 U.S. 1, 16-17. The court (1) must not "weigh the evidence or assess the credibility of the witnesses; (2) it must examine the evidence in the light most favorable to the government; (3) it can find the evidence to be legally insufficient only when the "prosecution's failure is clear."

Since the standards are so strict, the Court in *Burks* and *Hudson* has found that it would violate the principles of the Double Jeopardy Clause to allow the prosecution to cure an obvious failure of proof at the first trial by giving the prosecution a "second bite at the apple" through a second trial. *Burks*, 437 U.S. 1, 17.

Granting a new trial in the instant case offends no such Double Jeopardy principles. The prosecution need not cure a defect in its proof; the proof was ample. (Pet. A-33). The trial judge was merely unconvinced sitting as a "thirteenth juror."

The Question Presented by the Petition has already been resolved by *Hudson v. Louisiana* and the decision of the Indiana Supreme Court sought to be reviewed is not in conflict with *Hudson.*

2. The decision of the Supreme Court of Indiana is not in conflict with the applicable decisions of this Court.

The case of *United States v. Martin Linen Supply Co.*, 430

U.S. 564 (1977), cited by the Petitioner as being in conflict with the instant case, is clearly distinguishable.

First, *Martin Linen* involved the resolution of the propriety of government appeals under federal criminal and appellate procedure. Specifically, the Court held that the Double Jeopardy Clause prohibited appellate review under 18 U.S.C. §3731 where a proper motion under Federal Rule Crim. Proc. 29(c) had been granted following a mistrial and the discharge of the jury.

The Court held that the defendant's motion and the trial judge's action were entered "on the express authority of, and strictly in compliance with, Rule 29(c)." 430 U.S. 564, 570. Thus, the Court in *Martin Linen* could assess a Double Jeopardy question where the trial judge correctly followed criminal procedures.[1]

In the case for review, the trial judge totally ignored correct procedure. He weighed opposing evidence, assessed the credibility of witnesses, and resolved conflicts in the testimony in favor of the accused—all being in complete disregard of Ind. Trial Rule of Proc. 50 (*See* Pet. A-28).

Second, *Martin Linen*, like *Hudson v. Louisiana*, 450 U.S. 40 (1981) and *Burks v. United States*, 437 U.S. 1 (1978), discussed previously, involved a clear determination by the trial court of the legal insufficiency of the prosecuition's proof. The trial judge stated that the prosecution was "'the weakest (contempt case that) I've ever seen.'" 430 U.S. 564, 572. As this Court noted:

> "Thus, it is plain that the District Court in this case evaluated the Government's evidence and determined that it was legally insufficient to sustain a confiction." *Id.*

---

[1]For example, Rule 29(c) mandates that a motion for judgment of acquittal be made within 7 days after the jury is discharged. The motion in *Martin Linen* was timely filed, made six days after the discharge. 430 U.S. 564, 565-66.

As stressed in respondent's first Reasons Why the Writ Should Be Denied, the trial court in the instant case did not find the State's evidence legally insufficient.

It is submitted that Double Jeopardy protections are triggered by a proper finding of legal insufficiency of the prosecution's proof. That is the teaching of *Martin Linen*, *Hudson* and *Burks*—and those cases are not in conflict with this decision of the Indiana Supreme Court.

CONCLUSION

The decision below does not raise the Question Presented and the decision below is not in conflict with any applicable decision of this Court. For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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